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JOHN T. FEY, Clerk

IN THE Supreme Court of the United States

October Term, 1957

No. [redacted]

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA,

Appellant,

COLUMBIA BROADCASTING SYSTEM, INC., CBS TELEVISION FILM SALES, INC., NATIONAL BROADCASTING COMPANY, INC., CALIFORNIA NATIONAL PRODUCTIONS, INC., LOEW'S INCORPORATED, REPUBLIC PRODUCTIONS, INC., REPUBLIC PICTURES CORPORATION and HOLLYWOOD TELEVISION SERVICE, INC.,

Appellants,

vs.

WILLIAM (BILL) ATKINSON, JACK BARSBY, ALFRED E. BRAIN, CLARENCE P. CARPENTER, RUSSELL A. CHEEVER, and HARRIET CRAWFORD, individually and on behalf of all other instrumental musicians similarly situated,

Appellees.

No. _____

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA,

Appellant,

RADIO CORPORATION OF AMERICA, COLUMBIA BROADCASTING SYSTEM, INC., CAPITOL RECORDS, INC., LOEW'S INCORPORATED, DECCA RECORDS, INC., and CORAL RECORDS, INC.,

Appellants,

vs.

JOHN H. ANDERSON, JR., BURNETT F. ATKINSON, ROBERT BAIN, EDWIN VANCE BEACH, ROLAND E. BUNDOCK, LAWRENCE B. BUNKER and GEORGE CALLENDER, individually and on behalf of all other instrumental musicians similarly situated,

Appellees.

Motion of Appellees to Dismiss the Appeals or, in the Alternative, to Affirm the Judgments.

HAROLD A. FENDLER,
333 South Beverly Drive,
Beverly Hills, California,
DANIEL A. WEBER,
120 El Camino Drive,
Beverly Hills, California,
Attorneys for Appellees.

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PUBLICATION

New York Law Journal, Dec. 18, 1957, p. 4, col. 6 22

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Appellees.

Motion of Appellees to Dismiss the Appeals or, in the Alternative, to Affirm the Judgments.

Appellees hereby move to dismiss each of the appeals filed by the appellants in each of the above cases upon the following grounds:

(1) None of said appeals has been taken in conformity to statute (28 U. S. C. 1257(2)), in that neither of

the judgments appealed possesses the requisite attributes of finality and ripeness for review.

(2) The federal questions raised are wanting in substantiality.

(3) The appellants do not have the standing to raise the federal questions presented.

Appellees move, in the alternative, to affirm the judgments appealed from upon the ground that the federal questions presented are unsubstantial.

Questions Presented.

Preliminarily, the question presented is the reviewability by this Court of the judgments appealed from. That question may be stated in the following terms:

Does the judgment of a state court of last resort in a mandamus proceeding which directs a trial court to hear and exercise its discretion with respect to applications for provisional relief, made for the purpose of preserving the subject matter of the action, but which does not direct the granting or withholding of any such relief, constitute an adjudication which possesses the requisite attributes of finality and ripeness for review, where residual "federal rights" issues remain in the case, and the underlying action must proceed to trial without regard to any determination which may be made by this Court?

Turning to the "questions presented" as posed in the jurisdictional statement filed by the appellants Columbia Broadcasting System, Inc., *et al.* (hereinafter referred to as the "Columbia J. S.") and the jurisdictional statement filed by the appellant Federation (hereinafter referred to as the "Fed. J. S."), in our view they are deficient in that they take no account of the pivotal factual premise

upon which the decisions below were predicated, *i.e.*, the connection of the relevant transactions with California. The question resolved below in the affirmative may thus be stated:

Where employees who live and work in California file an action for restitution of payments growing out of their employment in California, which payments are alleged to be consideration for work largely performed in California, and in form are owing to a nonresident by their employers over whom the court has jurisdiction *in personam,* as a result of the unauthorized diversion thereof by their collective bargaining representative over whom the court also has jurisdiction *in personam,* is constructive service upon the nonresident constitutionally permissible for the purpose of preserving such payments *pendente lite* and procuring an adjudication, limited in its operational effect to such *res,* that plaintiffs are the owners thereof?

There is also presented the related question:

Do the appellants have the requisite standing to raise the federal questions presented by them in the circumstances now prevailing?

Statutes Involved.

The relevant statutes of California authorizing service of process by publication or personal service outside the state in lieu thereof (Cal. Code Civ. Proc., Secs. 412 and 413), which are set forth in both jurisdictional statements (Appendix C, Columbia J. S.; pp. 4-5, Fed. J. S.), must be read in conjunction with another section expressly defining the meaning of "personal property" as used in said sections, as well as elsewhere throughout that

code. Section 17, subdivision 3, of the California Code of Civil Procedure (Deering's Cal. Code Civ. Proc., p. 9), reads as follows:

> "The words 'personal property' include monies, goods, chattels, things in action and evidences of debt." (Cal. Stats. 1951, Chap. 1737, Sec. 1.)

The complaints filed by the appellees in the underlying Superior Court actions allege certain causes of action against the appellants (as well as other defendants) involving alleged violations of Section 222 of the California Labor Code. That statute reads as follows:

> "It shall be unlawful in case of any wage agreement arrived at through collective bargaining, either wilfully or unlawfully, or with intent to defraud an employee, a debtor or any other person, to withhold from said employee any part of the wage agreed upon" (Cal. Stats. 1937, Chap. 357, p. 774, Deering's California Codes Annotated, *Labor*, Sec. 222, p. 54).

Statement of the Case.

The mandamus proceedings culminating in the "judgments"[1] appealed from were initiated by separate petitions filed by appellees. All of the appellants (who constitute a small proportion of the total number of defendants personally served in California) filed demurrers to said petitions.[2]

[1]The writs of mandate were issued after notices of appeal were filed by most of the appellants.

[2]For purposes now relevant all allegations of the petitions for mandate, as well as the complaints in the actions below, must be accepted as true (*Bandini v. Superior Court*, 284 U. S. 8, 14, 15-16; *Rescue Army v. Municipal Court*, 331 U. S. 549, 566; *Silverman v. Greenberg*, 12 Cal. 2d 252, 254; *Newlove v. Mer-*

A. The Anderson Case.

In the *Anderson* case, the underlying Superior Court action was filed by 90 plaintiffs on behalf of approximately 6,000 phonograph recording musicians, against 87 phonograph recording companies doing business in California, including 32 California corporations, 32 additional entities doing business in California (either as individuals or partnerships), and 23 corporations organized elsewhere but doing business in California. More than 95% of the total phonograph recording business in the United States is done by defendants regularly engaged in doing business in California and over whom the California courts have obtained jurisdiction by personal service within the state. With respect to the great majority of said defendants, jurisdiction over them is unobtainable except in California. All of the appellants were personally served with process in California, where they are all regularly and systematically engaged in doing business. All of the named appellees work in California in the production of phonograph records pursuant to the relevant collective labor agreements.

The *Anderson* complaint and petition for mandate allege that a collective bargaining agreement was negotiated in January, 1954 by the appellant Federation as exclusive bargaining representative of the phonograph recording musicians, whereby a wage increase offered by their employers was diverted by the Federation from the musicians employed under the relevant labor agreements to

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cantile Trust Co., 156 Cal. 657, 665; *Opinion of District Court of Appeal*, p. 17, Appendix, Fed. J. S.). The Federation's jurisdictional statement departs in several respects from, and both jurisdictional statements insufficiently reflect, the factual context which is thus controlling.

a trust fund (of which Rosenbaum is trustee) used for the giving of free public concerts, and from which they get virtually no benefit. During the negotiations leading to such agreement, the employers offered to pay such wage increase to their employees (amounting to 10% above the existing scale for the first two years, and 21% for the last three years, of the proposed five-year contract term). The Federation insisted that the employers make all such so-called "wage increase" payments to Rosenbaum instead of the performing musicians (appellees). The employers acceded to this diversion only after Mr. James C. Petrillo, president of the Federation, made it clear that there would be no labor agreement unless they consented thereto (see factual summary in the opinion of the California District Court of Appeal, pp. 21-22, Appendix, Fed. J. S.).

The collective bargaining agreement refers to such payments as being "for the services rendered by the persons covered by this agreement in the making of recordings" [*Anderson* complaint, Ex. A, p. 2, par. 3]. The petition for mandate alleges, and it was admitted below, that such payments were and are treated as a "labor cost" (for musicians' services) by the employers.

As a result of the diversion of these increases, the phonograph recording musicians have been and are still obliged to work at their 1946 wage scale.

Rosenbaum, the non-resident trustee of the trust fund, is *not* a signatory to the 1954 phonograph record labor agreement [Ex. A, *Anderson* complaint], which is the instrument providing for the making of said wage increase payments to Rosenbaum. Provisions for these 10%-21% wage increase payments were incorporated in

the *wage* schedule of said labor agreement signed by each employer and the Federation [*Anderson* complaint, Ex. A, p. 12, I(g)].

Concurrently with the making of such wage increase payments to the trustee, the employer signatories were also required to make certain "royalty" payments to the trustee under companion trust agreements with him. These royalties were computed on the basis of a graduated scale of percentages of gross sales of records. Each such trust agreement was correlative to a labor agreement of the kind previously described, wherein it was provided in part that the labor agreement was being entered into by the Federation in consideration of the employer's execution of the trust agreement.

B. The Atkinson Case.

The *Atkinson* case is also a representative action, brought by 22 plaintiffs on behalf of approximately 2,400 instrumental musicians employed in the production of motion pictures, for whom the appellant Federation acted as exclusive collective bargaining agent. Some 76 defendants have been named and personally served in California, consisting of 47 California corporations, 5 California partnerships, and 24 corporate defendants doing business in California but organized elsewhere. All of the entities served (including the appellants in *Atkinson*) were and are regularly engaged in the transaction of business in California. The majority of the defendants served do business solely in California, and personal jurisdiction over them is unobtainable elsewhere.

Almost 97% of all employment of instrumental musicians in the scoring of motion pictures in this country, including the motion pictures giving rise to the diverted

payments, has taken place and still takes place in California.

For approximately three years (1952 to 1955) all of the distributors of theatrical films on television entered into collective labor agreements with the Federation under which so-called "reuse" payments were to be paid to the musicians employed in such pictures, *i.e.*, from $25 to $75 per musician per picture. Concurrently, the signatories were required to make additional "royalty" payments to Rosenbaum for such reuse, under companion trust agreements which the Federation required them to enter into with Rosenbaum. Payments for each such motion picture released to television were made to the musicians performing in each of such films until June 9, 1955. On that day, by the unilateral edict of the Federation, payments which had already accrued in favor of these musicians as well as payments thereafter accruing from such reuse, were ordered to be paid to the trust fund. The excuse given by the Federation, *i.e.*, that the musicians could not be located, was spurious.

The Federation asserts that "the Federation was not" a party to the trust arrangement between the motion picture distributors and the trustee (p. 6, Fed. J. S.). This statement ignores the fact that every trust agreement resulted from a negotiation between the distributor and the Federation (not Rosenbaum), and from a contemporaneous labor agreement with the Federation (governing "re-shooting" of any scenes for television purposes) requiring the distributor to sign the trust agreement as a condition precedent to the effectiveness of the labor agreement. Performance of the trust agreement was specifically exacted by the Federation in each correlative labor agreement.

The Federation is also in error in asserting that the action of the Federation in June, 1955, whereby it put an end to the making of reuse payments directly to the musicians who scored the motion pictures, operated only "prospectively" (p. 6, Fed. J. S.). All such payments which *had theretofore accrued* in favor of the musicians who scored the motion pictures were included in the diversions to the trust fund (these and other salient facts will be found in the factual summary appearing in the opinion of the California District Court of Appeal, pp. 16-20, Appendix, Fed. J. S.).

C. Genesis of the Underlying Suits.

The genesis of the underlying suits, as disclosed by the record below, is the organized resistance to the Federation's trust fund policies of musicians who reside in California and who work there under the relevant collective agreements. They belong to Los Angeles Local 47 of the Federation. Some 3500 California musicians, whose services are utilized from time to time in the production of motion pictures and in the manufacture of phonograph records, have resisted the practices of the Federation and their officers of bargaining away wage and employment benefits resulting from their services and which are procurable for them, in order to enrich the trust fund at their expense. In *Anderson*, the phonograph recording musicians objected to the appropriation to the trust fund of 21 cents for each dollar paid to the musicians for their services (as well as "royalties" paid by their employers) under the collective agreements here involved; and in *Atkinson*, the musicians who record music used in motion pictures objected to the deprivation of payments formerly received by them, as well as the Fed-

eration's diversion of all other payments to the trust fund from reuse on television of theatrical films produced by them.

The suits were filed after all efforts within the structure of the Federation to procure redress proved abortive. The witnesses whose testimony is required by the appellees to establish their claims are primarily California residents. Witnesses who live and work in California can establish the hostility and ill-founded motives of the Federation in effectuating the trust fund diversions, as well as the customs and prevailing practices in the industry of making reuse payments to members of other talent guilds when theatrical films are used on television. The necessary witnesses to establish the protests and futile efforts to procure relief within the Federation, including specific measures taken by the membership of Los Angeles Local 47 to that end, are California residents. Their testimony is likewise required in each case to establish the specific violations of Section 222 of the California Labor Code (see "Statutes Involved," *supra*).

D. The Gravamen of the Underlying Actions.

The gravamen of each action is that the Federation, as the collective bargaining representative of the appellees, breached its fiduciary duties to appellees in diverting to the trustee actual, as well as obtainable, wages and employment benefits deriving from the rendition of their services under the relevant collective agreements.[3] It is

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[3]Payments by an employer to a trust fund which arise from a collective labor agreement or from collective bargaining negotiations are *deemed wages*, even though the agreement expressly states that they shall not be so regarded (*United States v. Carter*, 353 U. S. 210, 217-218).

alleged in the complaints and petitions for mandate (and the demurrers to said petitions must be deemed to concede for present purposes) that the Federation imposed upon the appellees an involuntary and discriminatory subsidy out of their earnings or potential earnings in order that 97½% of the members of the Federation who do *not* work in the industries involved may secure benefits from the trust fund; and that the Federation was actuated by motives of hostility toward the appellees and by the personal aims of its executive officers to curry favor with some 650 other locals of the Federation (whose members do not work in the recording industries), to the end of perpetuating themselves in office.[4]

The complaints and petitions for mandate assert that the diversions of wage increase, reuse and royalty payments constitute a fraud upon the employees (appellees); and that they are in equity entitled to the payments involved. It is also alleged that said diversions represent unlawful deductions from the musicians' wages in violation of Section 222 of the California Labor Code (see "Statutes Involved," *supra*). Restitution is sought of the payments sought to be impounded through the imposition of a constructive trust thereon in favor of the appellees.

The complaint in each case also contains certain causes of action for damages against the Federation, relating to diverted payments to Rosenbaum made prior to the filing of the underlying suits. These are separate and

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[4]The impropriety of the Federation's conduct and its violation of duty is indicated by the recent case of *Conley v. Gibson*, 355 U. S. 41, 46, 78 S. Ct. 99, 102, decided November 18, 1957; *Ford v. Huffman*, 345 U. S. 330, 337-338; *Radio Officers' Union, etc. v. N.L.R.B.*, 347 U. S. 17, 47, 48; *Steele v. Louisville & N. R. Co.*, 323 U. S. 192, 202-203; *J. I. Case Co. v. Labor Board*, 321 U. S. 332, 338).

apart from the payments which were sought to be impounded. The issues on these appeals do not affect said causes of action, nor the trial thereof.

E. Proceedings Subsequent to State Supreme Court Writs of Mandate.

Following the issuance of the writs of mandate by the California Supreme Court, appellees' applications for preliminary injunctions and receiver *pendente lite* in each of the underlying actions came on for hearing in the California Superior Court. On January 17, 1958, an order was made in the *Anderson* case enjoining the appellants and other debtor defendants personally served from making any of the 21% wage increase payments under the phonograph record labor agreement to Rosenbaum; and appointing a receiver (a Los Angeles bank) to collect such payments during the pendency of said action. Appellees filed the bond ordered as a condition (in the sum of $50,000); and the receiver has duly qualified and is now acting as such. The motion for provisional relief in *Atkinson* was denied *in toto* on January 8, 1958. Appellees thereafter petitioned the California Supreme Court to command the Superior Court to grant provisional relief in *Atkinson*. This was denied without opinion on February 5, 1958.

ARGUMENT.

I.

The Judgments Appealed From Lack the Requisite Finality and Ripeness for Review.

The California Supreme Court did nothing more than to command the Superior Court to exercise its discretion with respect to the granting or withholding of provisional relief. That has been done; favorably (in part) to the appellees in *Anderson;* and unfavorably in *Atkinson*. Although precedent will be found for regarding a writ of mandamus as a final judgment under certain circumstances, it is submitted that the judgments in the instant cases should not be so regarded. Here the issues were projected on motions for provisional relief solely to preserve the subject matter of the actions *pendente lite.*[5]

In each of the cases cited by appellants involving judgments held to be appealable, a definitive ruling by this Court on the issues raised therein was tantamount, for all practical purposes, to ending the underlying litigation or determining the ultimate result (*Rescue Army v. Municipal Court*, 331 U. S. 549, 568). In each of the instant cases, no action by this Court can affect the trial of the damage claims against the Federation, or any causes of action which may be asserted against the debtor appellants for losses suffered by appellees in violation of Section 222 of the California Labor Code. Such claims will be unaffected by any action which may be taken on the issues now before the Court. This is so whether or

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[5]The granting of provisional relief, under California law, "does not amount to an adjudication of the ultimate rights in controversy." (*Miller & Lux v. Madera Canal, etc. Co.*, 155 Cal. 59, 62-63; *People v. Black's Food Store*, 16 Cal. 2d 59, 62; *Kendall v. Foulke*, 180 Cal. 171, 175).

not the appellees, by appropriate amended and supplemental pleadings, should assert independent or further claims against the debtor appellants for payments heretofore or hereafter made to Rosenbaum in fraud of appellees' rights.[6]

In any event, even though statutory grounds of appeal from a final judgment may be present, adequate reasons may impel this Court not to exercise such jurisdiction (*Rescue Army v. Municipal Court*, 331 U. S. 549, 568 *et seq.*; citing many illustrations). An oft-invoked ground for declining to exercise such jurisdiction is the established precept that "where the remaining litigation may raise other Federal questions that may later come here . . . . to allow review of an intermediate adjudication would offend the decisive objection to fragmentary review" (*Radio Station WOW, Inc. v. Johnson*, 326 U. S. 120, 127; *Republic Gas Co. v. Oklahoma*, 334 U. S. 62, 70-72; *Cobbledick v. United States*, 309 U. S. 323, 326).

The vice of piecemeal review is demonstrable in the instant cases. There still will remain for determination the liability of appellants for payments actually made as well as the damage claims against the Federation. Furthermore, the Federation has pleaded in its answer in each case the defense that "in entering into the contracts and agreements referred to . . . . defendant Federation did so pursuant to its authority and duty as exclusively vested and defined by the National Labor Relations Act and said Labor Management Relations Act, 1947." The

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[6] As noted by the California Supreme Court, payment to Rosenbaum would not discharge appellants' liability to appellees (p. 11, Appendix A, Columbia J. S.; p. 10, Appendix, Fed. J. S.). The trial of such damage claims would not be affected by any action which may be taken here.

Federation also claimed upon the hearing in the Superior Court which followed issuance of the writs of mandate, that the California courts lacked jurisdiction because of the alleged exclusivity of federal jurisdiction. Thus, a residuum of "federal rights" issues, including a different jurisdictional attack, would remain after a review at this time.

A holding now that the judgments are not ripe for review will not preclude this Court from passing upon the jurisdictional issues raised in the event of a review by this Court after a final judgment terminating the underlying litigation. In the event of a dismissal for lack of the requisite finality or ripeness, the appellants' constitutional objections would be "saved" to them for assertion in this Court in the event of any review of a final judgment in the underlying litigation (*Republic Gas Co. v. Oklahoma*, 334 U. S. 62, 72). Even though the judgments of the California Supreme Court now sought to be appealed from should be regarded "as laying down the law of the case, this court will not be thus bound" (*Grays Harbor Co. v. Coats-Fordney Co.*, 243 U. S. 251, 257).

Since the proceedings below dealt with provisional relief, such final judgment would moot the instant appeals without impairing the assertibility in this Court of the points now raised as an incident to review of such final judgment (*Champlin Refining Co. v. Corporation Commissioner*, 286 U. S. 210, 224; *Sterling v. Constantin*, 287 U. S. 378, 386).

In *Atkinson*, there is an additional circumstance which militates against reviewability of the judgment. Following the issuance of the writ of mandate in that case, the Superior Court denied on the merits the appellees' mo-

tion for provisional relief. As the record stands, the appellants are the prevailing parties on the merits with respect to the motion which they contend the Superior Court had no jurisdiction to determine. No appeal has been taken from the order denying provisional relief. None is intended. The claimed possibility of a new motion by appellees for provisional relief is purely theoretical and appears to us as an exercise in futility. The contracts involved in *Atkinson* expired on January 31, 1958. To speculate further that the Superior Court might reverse itself on a motion which appellees have no intention of making is pure fancy. No one can vouchsafe that when the case comes on for trial there will be payments owing by any debtors, and hence whether there will be any *res* remaining which may be sequestered by the appellees. Thus, there is ample justification for declining to review that case "until necessity compels it" (*Rescue Army v. Municipal Court*, 331 U. S. 549, 569).

II.

In View of the Recent Reaffirmation by This Court of the Governing Principles Applied by the California Supreme Court, the Federal Question Is Devoid of Substantiality.

The appellants' claim that due process has been infringed by the judgments of the California Supreme Court rests upon a very narrow premise. It is said that California lacked the jurisdictional competence to deal with these intangibles because the appellees were not claiming in the right of Rosenbaum but adversely to him. The argument runs that where intangibles are involved, the plaintiff must concede that the nonresident owns the intangible; and if the plaintiff claims that he has a superior right, or that the nonresident never acquired any

legal right thereto, *quasi in rem* jurisdiction over the intangible based on constructive service is a constitutional impossibility. The appellants also argue the corollary proposition that an intangible may be subjected to court control (on the basis of constructive service) only where it is sought to appropriate the same toward the satisfaction of another or independent claim against the nonresident.

In rejecting the contention that due process and state power turn on such theoretical differentiation, the California Supreme Court held that in respect to the intangibles in question, "jurisdiction must be determined in the light of the totality of contacts with the state involved" (p. 10, Appendix A, Columbia J. S.; p. 9, Appendix, Fed. J. S.). The correctness of the test applied by California is reflected by the recent pronouncements of this Court in *McGee v. International Life Insurance Co.*, 355 U. S. 220, 223 (see also cases there cited).

On the basis of the extensive record before it, the California Supreme Court found that "the multiple contacts with this state fully sustain the jurisdiction of the superior court to exercise *quasi in rem* jurisdiction over the intangibles in question" (p. 12, Appendix A, Columbia J. S.; p. 11, Appendix, Fed. J. S.). That abundant support for such finding reposes in the record may be readily discerned from the summary hereinbefore set forth (see "Statement of the Case", *supra*).

The appellants stress the fact that Rosenbaum was never "present" in California. Any pre-existing doubt with respect to the abandonment of "presence" within a state as a prerequisite to jurisdiction under due process was laid to rest in the *McGee* case. In upholding a

personal judgment for money on the basis of constructive service under a California statute governing insurance claims against a defendant corporation which never had "any offices or agents in California," and had "never solicited or done any insurance business in California" (355 U. S. at p. 222), this Court said (*ibid.*):

> "In a continuing process of evolution this Court accepted and then abandoned 'consent', 'doing business,' and 'presence' as the standard for measuring the extent of state judicial power over such corporations."

The appellants' attempt to impute to Rosenbaum absolute detachment from California, so far as the relevant transactions are concerned, is to dismiss completely the legal relationship which exists between him and his promisee (the Federation). His role was such that he did not become the obligee of *any* payments under *any* contracts unless and until the Federation entered into a *labor* agreement which called for such payments (either by provision therein or in the correlative trust agreement). It is therefore fanciful to say therefore that no matter how much activity and employment took place in California under the relevant agreements giving rise to the payments in question, the underlying transactions have no "substantial connection" with California.

Likewise devoid of substance is the claim that jurisdiction must fail because the contracts were allegedly entered into in New York and are "performable" there (meaning presumably that the actual *receipt* by Rosenbaum of remittances takes place in New York). A substantial part of the "performance" giving rise to the impounded payments in the *Anderson* case takes place in California, where at least one-third of all this country's

phonograph records are produced. Moreover, this Court has recognized that in considering due process, "conceptualistic discussion of theories of the place of contracting or of performance" of a contract must yield to the realities of a given situation. Where denial of due process is asserted by a non-resident, "great weight" is placed upon the practical consequences of the relevant transactions; and "to the unwisdom, unfairness and injustice" of requiring resident claimants of a particular forum to assert their remedies "only in some distant state" (*Hooperston Co. v. Cullen*, 318 U. S. 313, 316-317; *Travelers Health Ass'n v. Virginia*, 339 U. S. 643, 648; *McGee v. International Life Insurance Company*, 335 U. S. 220, 222).

For purposes of *quasi in rem* jurisdiction, it has been frequently held by this Court that a debt may be validly attached, garnished or sequestered by injunctive process, receivership or other appropriate means in any forum where the debtor or fundholder may be sued. This is so without regard to the place o creation of the debt, or the agreed place of payment (*e.g., Pennington v. Fourth National Bank*, 243 U. S. 269; *Harris v. Balk*, 198 U. S. 215; *Security Savings Bank v. California*, 263 U. S. 282; *Standard Oil Co. v. New Jersey*, 341 U. S. 428, 443; *Jellenik v. Huron Mining Co.*, 177 U. S. 1, 12-14). Contrary to appellants' contention, cases upholding such jurisdiction were not limited to situations where the plaintiffs were seeking to have the intangibles appropriated to the satisfaction of independent claims against the non-residents, but included situations where the plaintiffs were asserting rights of ownership in the intangibles (*e.g., Jellenik, Security* and *Standard Oil* cases, *supra*).

In *Jellenik*, this Court expressly rejected the contention that jurisdiction to determine conflicting claims predicated on constructive service upon a nonresident is limited to personal property susceptible of "manual possession"; and held that it was immaterial whether the adverse interests sought to be adjudicated related to "chattels or choses in action, or property in the nature of choses in action" (177 U. S. at pp. 12-14).

In *Standard Oil Company v. New Jersey, supra* (involving escheat of intangibles), this Court held, in the face of constitutional objections in parallel with those asserted here, that sequestration of debts (declared stock dividends) through jurisidction over the debtor, and constructive service on the nonresident claimants, empowered the court to adjudicate ownership of the intangibles. This power existed notwithstanding the fact that funds which had been set apart for payment of the corporate dividends and the stock in question were physically located outside the forum state. The court likened the effect of jurisdiction over the debtor to jurisdiction over tangible property within a state (p. 443). The Court held (p. 439):

> "That power to seize the debt by jurisdiction over the debtor provides not only the basis for notice to the absent owner but also for taking over the debt from the debtor." (See also *Security Savings Bank v. California*, 263 U. S. 282, 285; *Harris v. Balk*, 198 U. S. 215, 222.)

In essence, the argument of the appellants that there would be a *res* if appellees were claiming *under* Rosenbaum rather than adversely to him, is an oblique way of saying that a plaintiff may only sequester a nonresident's

title to a chose in action. In *Propper v. Clark*, 337 U. S. 472 (reh. den. 338 U. S. 841), where intangibles were involved (consisting of music royalties owed by ASCAP to an Austrian association), this Court pointed out that the requirement of control over the intangible:

> ". . . can be met *in other ways than seizure of title*, e.g., by an injunction against transfer of the property (citation), by an attachment (citation), or by personal service on the party holding the property within the state (citation). We have no doubt that where property is in a state and comes under the control of a court, as here by appointment of the temporary receiver, it is fair to permit substituted service (citation)." (p. 488). (Emphasis added.)

The last sentence has particular pertinence here. The payments made by the debtor appellants to the receiver in the *Anderson* case constitute a fund under the actual control of the California court. To persist in saying there is no *res* which California may lay hold of is to defy reality. A final judgment disposing of such *res* would be entitled to full faith and credit; and obedience on the part of any appellant, or any debtor over whom the California Superior Court has jurisdiction *in personam*, to the injunction and receivership order, or to any such judgment, would exempt such debtor from liability for non-payment to Rosenbaum (*Harris v. Balk*, 198 U. S. 215, 226; *Pennington v. Fourth National Bank*, 243 U. S. 269; *Security Savings Bank v. California*, 263 U. S. 282, 287; *Standard Oil v. New Jersey*, 341 U. S. 428, 443). Accordingly, if Rosenbaum should assert any claim in the New York suit which he instituted during the pendency of the California suits, or in any other

suit, the appellants could set up the California proceedings in bar, at least to the extent of the *res* subject to the control of the California courts.[7]

The decisions of this Court cited by appellants as purportedly supporting their contention that jurisdiction was lacking, *i.e., New York Life Ins. Co. v. Dunlevy,* 241 U. S. 518; *Bank of Jasper v. First National Bank,* 258 U. S. 112; *Estin v. Estin,* 334 U. S. 541; *Vanderbilt v. Vanderbilt,* 354 U. S. 416, are clearly distinguishable.

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[7]Rosenbaum commenced his action in New York (wherein the positions taken by the Federation and the trustee are in accord) several weeks *subsequent* to the original filing of the *Anderson* and *Atkinson* actions in California, and *subsequent* to the issuance by the California court of orders to show cause why it should not grant appellees' motions for preliminary injunctions and a receiver. In the New York action, Rosenbaum named a handful of New York musicians and some, but far from all, of the defendants named in the California actions. Countless defendants personally served in California are not named and could not be served within the jurisdiction of New York. On December 18, 1957 the Appellate Division of the New York Supreme Court, in denying "without prejudice" a motion by said musician defendants for a dismissal of the New York action, stated in part:

> "There is more than a suspicion that the action of the trustee [Rosenbaum] in seeking a judicial declaration that the several agreements are valid, is motivated by the existence of the action in California in which the present plaintiff, as trustee, is named as a defendant" (New York Law Journal, December 18, 1957, p. 4, column 6).

That court furthermore indicated the non-representative character of the New York suit by stating:

> "We recognize the possibility that some of the individual defendants named as members of the federation and constituting those necessary to make this a class action may be 'captive' parties. Otherwise stated, it appears that some, if not all of these individual defendants are defending this action within certain boundaries defined by officials of the federation."

There has been and is no impediment now, to a motion by appellants in the New York action (wherein issue is not yet joined by all parties), for a stay pending determination of the prior California suits.

The *Dunlevy* case, which involved interpleader by a debtor, held that a debtor can not exonerate his personal liability to a non-resident by interpleading conflicting claimants in a forum of his choice, and thereby convert his *in personam* liability into one *quasi in rem*. All three California courts which passed on the jurisdictional question in the instant cases noted the inapplicability of interpleader cases. *Bank of Jasper* involved an indebtedness which had become merged in negotiable certificates of deposit that were *not within the forum state* (Florida). There was therefore no *res* within the state. These controlling facts were thus held to be dispositive of the issue:

> "As neither the certificates of deposit nor the holder thereof were within the state of Florida, its courts could not—in the absence of consent—acquire jurisdiction to determine the liability of maker to holder." (258 U. S. 112, at p. 119).

That case is therefore not authority for the proposition that there is no *res* in the instant cases.

Estin v. Estin, heavily relied upon by appellants in this Court and in the courts below, is a migratory divorce case. It involved the extent to which *in personam* liability for alimony may be annulled by a debtor husband, where such liability has been *duly adjudicated* by a New York court having personal jurisdiction over both parties. This Court held that Nevada had no power, in a subsequent suit for divorce instituted by the husband, to annul his liability under the previous New York judgment on the basis of substituted service upon the wife. That case, as well as *Vanderbilt v. Vanderbilt*, 354 U. S. 416, and like cases, concerned themselves with protection of the right to marital support or alimony against destruction by

means of "ex parte divorce". They call into play different considerations and facts from those involved here.

Notwithstanding appellant Federation's suggestion to the contrary (p. 15, Fed. J. S.), the decision of the California Supreme Court is consistent with many other decisions of state courts of last resort (see collection of cases cited by that court; pp. 7-8, Appendix A, Columbia J. S.; p. 7, Appendix, Fed. J. S.).[8] At least two Circuit Courts of Appeal have similarly upheld *quasi in rem* jurisdiction under comparable circumstances (*Omaha National Bank v. Federal Reserve Bank*, 26 F. 2d 88, cert. den. 278 U. S. 615; *Thompson v. Terminal Shares*, 89 F. 2d 652, 656-657, cert. den. *sub nom. Guaranty Trust Co. v. Thompson*, 302 U. S. 735).

To contend that a debt may be sequestered or appropriated if the plaintiff is claiming a property interest therein under a non-resident, but that it may not be constitutionally sequestered if the plaintiff is a defrauded *cestui* claiming a better right therein than that of the non-resident, is to say that "traditional notions of fair play and substantial justice" (*McGee, supra*, at p. 222) permit the exercise of state power in the former case, but not in the latter. Such shrinkage of *quasi in rem* jurisdiction is not justified by any genuine or prevailing precepts of due process and is directly opposed to the current of decisions.

It is submitted that the contentions advanced by appellants are lacking in substantiality.

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[8]As pointed out by the California Supreme Court, the cases of other state courts cited by appellant Federation may be "reconciled on their facts" when the "totality of contacts with the state involved" becomes the frame of reference (pp. 10-11, Appendix A, Columbia J. S.; pp. 9-10, Appendix, Fed. J. S.).

III.

The Appellants Do Not Have the Standing to Raise the Federal Questions Presented.

Viewed in the context of the provisional relief which has actually been granted, the standing of appellants is dubious. The only moneys which have been impounded by the Superior Court are those which flow in the *Anderson* case from labor (not trust) agreements entered into between the *Federation* and the appellants, over whom the California court had *in personam* jurisdiction. These are the payments computed on the basis of 21% of the wages earned by the musicians in the production of phonograph records. Rosenbaum is *not* a signatory to these agreements. Whatever interest he has derives from the promisor's (employer's) promise to the promisee (the Federation) to make such wage increase payments to Rosenbaum. As such third party beneficiary he stands in the promisee's shoes, and cannot acquire a better right against the promisor than his promisee had (*Alexander v. Equitable Life Assurance Society*, 233 N. Y. 300, 306; *Gennett v. Smith*, 244 App. Div. 3, 278 N. Y. Supp. 478, 480).[9] Thus, while Rosenbaum may be a proper party in respect to the wage increase payment agreements, he is *not* an *indispensable* party in view of the Superior Court's jurisdiction *in personam* over the promisor as well as the promisee under whom he claims.[10] The Superior Court thus had before it the parties to the transactions and agreements whose conduct is claimed to be a fraud upon the appellees.

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[9]The appellants make the point that the agreements are governed by New York law.

[10]The California cases cited by appellants anent indispensable parties (p. 10, footnote, Columbia J. S.) are quite different from the situation before us.

It is submitted that where the contracting parties to a written agreement claimed to constitute a fraud on a *cestui* are personally before the court, they have no constitutional right to bar an adjudication as to whether they had a right to make such contract, on the plea that the destined recipient of the fruits of the fraud was absent. Apart from these considerations, the debtor appellants have no constitutional right to bar a determination as to whether such payments are proscribed deductions from the wages of appellees in violation of Section 222 of the California Labor Code. Moreover, if they are in violation of the statute, they have no constitutional right to continue to make such illegal deductions until the recipient of the illegal payments is personally served in the forum. In the circumstances prevailing, the application below of the relevant publication statute did not result in any injury to the appellants legally cognizable as a ground of constitutional objection on their part. One may not derivatively assert, or appropriate to himself, a constitutional right in favor of a third party (*Ashwander v. Valley Authority*, 297 U. S. 288, 347; *Barrows v. Jackson*, 345 U. S. 249; *Viellen v. Neilston Warehouse Co.*, 311 U. S. 531).

Additionally, the appellant Federation is not a party enjoined under the preliminary injunction issued in the *Anderson* case. Unlike the debtor appellants, the Federation is not obligated to make *any* payments to Rosenbaum in *Anderson* or *Atkinson*. There is no claim that any of *its* property is being taken without due process of law, either because of any alleged risk of double payment or otherwise. We therefore perceive no tenable basis upon which the Federation may assert the alleged constitutional

infirmity ~~which is said~~ to inhere in constructive service on Rosenbaum.

In view of the circumstance that appellants have prevailed on the merits with respect to appellees' motion for provisional relief in *Atkinson*, and of the consequences of the Superior Court's denial of provisional relief in that case (see last paragraph, point I, *supra*), we submit that the appellants do not now have the requisite standing to assert the constitutional questions presented.

Conclusion.

Each of the appeals should be dismissed or, in the alternative, the judgments appealed from should be affirmed.

Dated: February 28, 1958.

Respectfully submitted,

HAROLD A. FENDLER,

DANIEL A. WEBER,

Attorneys for Appellees.